United States Court of Appeals

for the Second Circuit

PETITION

75-4049
75-4055

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P/S

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
CAPTAIN EUGENE L. COCHRAN,

Petitioners,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

ON PETITIONS FOR REVIEW OF AN ORDER
OF THE CIVIL AERONAUTICS BOARD

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BRIEF FOR RESPONDENT

COUNTERSTATEMENT OF THE ISSUE

Whether the Civil Aeronautics Board's determination that its embargo regulation did not cover nine air carriers' blanket refusal, on safety grounds, to transport all shipments of "hazardous materials" without regard to whether a shipment of such materials meets all applicable federal safety regulations, "unlawfully interfered" with the carriers' right to refuse to accept cargo on safety grounds.

COUNTERSTATEMENT OF THE CASE

1. Preliminary Statement.

This case presents a challenge by the Air Line Pilots Association and one of its members (hereinafter referred to collectively as "ALPA") to Civil Aeronautics Board Order 75-2-127 (App. D).[1/]

By that order, the Board rejected "embargo notices" filed by nine air carriers which stated that the carriers would, as the Board put it, "refuse and/or limit * * * substantially all shipments of hazardous materials" (App. D, p. 1).[2/] Finding "that its embargo regulations [do not] embrace the matters set forth in the * * * embargoes," the Board rejected the notices (id., at 3).[3/]

We will describe the proceedings before the Board and the reasons for its action subsequently. As a starting point, however, we believe that a brief description of the statutory and regulatory background will be helpful to the Court.

1/ Record references in this brief will be made by citation to the appendices to ALPA's motion for stay and the "supplemental documents" later filed by ALPA.

2/ The nine carriers are Alaska Airlines, Inc., Allegheny Airlines, Inc., Eastern Air Lines, Inc., Frontier Airlines, Inc., Hawaiian Airlines, Inc., Ozark Air Lines, Inc., Piedmont Aviation, Inc., Trans World Airlines, Inc. and Western Air Lines, Inc.

3/ The State of New York has been granted leave to intervene on ALPA's side and has filed a brief. Its brief, however, generally tracks ALPA's, and accordingly, our argument will be cast in terms of ALPA's contentions.

2. Statutory and regulatory background.

The statute immediat y involved is the Federal Aviation Act of 1958 (49 U.S.C. 1301 et seq.). It establishes two regulatory programs for air transportation. One is economic regulation and it is the Board which administers and enforces those provisions of the Act. The other is safety regulation, a matter committed by the statute to the Department of Transportation and the Federal Aviation Administration (DOT/FAA).

Among the economic regulatory provisions of the Act is Section 404(a), 49 U.S.C. 1374(a), under which every air carrier holding a certificate of public convenience and necessity from the Board authorizing it to engage in air transportation is under an affirmative duty "to provide and furnish * * * air transportation * * * as authorized by its certificate * * * upon reasonable demand therefor * * *." This is, of course, merely a codification of the common law duty of a common carrier to carry. In addition, Section 404(a) imposes a duty to provide "adequate" service. 4/

In recognition of the possibility that a carrier may sometimes be "temporarily unable to perform all of the authorized transportation required of it," because of "lack of facilities or personnel, or because

4/ See, e.g., Toledo Adequacy of Service Case, 30 C.A.B. 169 (1959), affirmed, Capital Airlines v. C.A.B., 281 F.2d 48 (C.A.D.C., 1960).

it is required to give preference or precedence to other traffic entitled to priority, or because of other compelling reasons not within the control of the carrier," the Board has promulgated regulations governing "embargoes on property" (14 C.F.R. 228.1, emphasis added). These regulations define "embargo" as "the temporary refusal by an air carrier to accept for transportation * * * any commodity, type or class of property * * *" when, for any of the reasons specified above, the carrier is "temporarily unable to perform all of the authorized transportation service required of it * * *."

The embargo regulations provide that an embargo shall not be of more than 30 days duration (Section 228.2).[5/] A carrier is required to give public notice of its embargo (Section 228.3) which goes into effect without any action by the Board, though the regulations do require that copies of the public notice be "mailed" to its Tariffs Section (Section 228.5). Moreover, Section 228.2 expressly provides that an embargo notice under Part 228 "shall not be construed as relieving any air carrier * * * of any duty otherwise imposed upon it to furnish

5/ Section 228.2(b) provides that an application may be filed with the Board to extend the embargo for more than 30 days where the carrier "finds it necessary to continue in effect any embargo imposed under the provisions of this part for more than 30 days from the effective date of such embargo * * *." Section 228.24 stipulates that the Board may grant an application to extend an embargo for a specified period upon a finding that the conditions set forth in the definition of an embargo continue to exist.

authorized transportation service or to observe all requirements of the Federal Aviation Act, and the rules and regulations thereunder."

Section 601 of the Act (49 U.S.C. 1421) charges DOT/FAA with responsibility respecting "safety of flight of civil aircraft in air commerce." Pursuant thereto, DOT/FAA has promulgated comprehensive regulations governing the "loading and carrying [of] dangerous articles and magnetized materials in any civil aircraft in the United States and in civil aircraft of United States registry anywhere in air commerce" (14 C.F.R. 103.1(a)).[6/] These regulations lay down packaging, marking, and labeling requirements (14 C.F.R. 103.11 and 103.13), as well as restrictions on types and quantities of dangerous articles that may be transported on passenger-carrying and cargo-only aircraft (14 C.F.R. 103.7, 103.9, 103.19). They also set forth special requirements for radioactive, magnetized, and poisonous materials, including additional restrictions relating to packing and marking, along with detailed directions regarding permissible positioning of such shipments on the aircraft (14 C.F.R. 103.29, 103.31, and 103.35). Recent amendments to Part 103 were adopted

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6/ 14 C.F.R. 103.1(b) defines dangerous articles as "the material defined and regulated in the applicable regulations of the Department of Transportation (49 C.F.R. Parts 170-189) * * *." The latter regulations include, inter alia, explosives; flammable liquids and solids; oxidizing materials; corrosive liquids; compressed gases; poisons; etiologic agents; and radioactive materials. See also, 49 C.F.R. Part 172, which sets forth a listing of hazardous materials subject to the DOT regulations.

> "to prohibit the carriage of any dangerous article in an aircraft unless the outside container in which that article is packaged has been inspected to determine that, in all outward respects, it complies with the packaging, marking, and labeling requirements of Part 103. In addition to this inspection, these amendments require that, after June 30, 1975, when radioactive materials are to be carried, the exterior surfaces of the package, and, when appropriate, certain parts of the aircraft, be scanned with a radiation monitoring instrument." 7/

In addition to the Federal Aviation Act, legislation specifically designed "to improve the regulatory and enforcement authority of the Secretary of Transportation to protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce" was enacted just a little more than three months ago. Act of January 3, 1975, P.L. 93-633, 88 Stat. 2156, Sec. 102 ("Transportation Safety Act of 1974"). The statute provides that, "upon a finding by the Secretary, in his discretion, that the transportation of a particular quantity and form of material in commerce may pose an unreasonable risk to health and safety or property, he shall designate such quantity and form of material or group or class of such materials as a hazardous material" (Section 104). However, the statute contains a specific prohibition on the transportation of radioactive materials on passenger aircraft "unless the radioactive materials involved are intended for use in, or incident to, research, or medical diagnosis

7/ 40 F.R. 5140, February 4, 1975. The new regulations impose the inspection and scanning requirements on the carriers.

or treatment, so long as such materials as prepared for and during transportation do not pose an unreasonable hazard to health and safety" (Section 108(a)). With respect to this provision as to the transportation of radioactive materials on passenger carrying aircraft, the Congress afforded the Department of Transportation four months from the date of enactment within which to promulgate implementing regulations, i.e., by May 3, 1975. Pursuant thereto, DOT/FAA has instituted a rule-making proceeding looking to adoption of regulations by the statutory deadline. 8/

3. The proceedings below and the order under review.

As indicated earlier, this case involves embargo notices filed by nine carriers in purported reliance on Part 228 of the Board's Economic Regulations (14 C.F.R. 228, the embargo regulation). The embargoes were succinctly described by the Board as follows in its rejection order (App. D, at 1):

> "Alaska, Allegheny, Frontier, and Piedmont have embargoed, systemwide, all hazardous materials except radioactive pharmaceuticals for medical purposes, dry ice, and magnetic materials. Eastern has placed a total embargo on passenger aircraft except radioactive materials to be used for medical purposes and has limited the quantity of restricted

8/ 40 F.R. 5168, February 4, 1975.

> articles accepted on all-cargo aircraft to the quantity permitted on passenger aircraft. Hawaiian has embargoed all hazardous articles on passenger aircraft except radioactive materials to be used for medical purposes, dry ice, magnetic materials, and nonpressurized liquid nitrogen, and limited the quantity of restricted articles accepted on all-cargo aircraft to the quantity permitted on passenger aircraft. Ozark and Western have embargoed all restricted articles except radioactive medicines, dry ice, nonpressurized liquid nitrogen and magnetic materials. Trans World has limited the quantity of restricted articles accepted on all-cargo aircraft to the quantity permitted on passenger aircraft."

In general, the justifications advanced by the carriers for the embargoes fell into two broad categories. Some relied on the alleged inadequacy of DOT/FAA enforcement of its regulations and/or alleged inadequacy of the regulations themselves. Others relied on their alleged "inability" to transport the embargoed articles by reason of the refusal of ALPA pilots to fly aircraft carrying such articles. This refusal, in turn, was said to rest upon an official ALPA program called "Operation S.T.O.P." ("Safe Transportation of People") under which, with minor exceptions, the pilots will not fly passenger aircraft with any hazardous article on board <u>irrespective of whether the shipment meets DOT/FAA rules governing the carriage of such articles</u>.

In the order under review, the Board "rejected" the embargo notices. It determined that:

> "In embargoing all hazardous materials (with limited exceptions) the carriers are declaring that they will not accept a broad list of articles which are suitable for carriage under the regulations of the Department of Transportation/Federal Aviation Administration (DOT/FAA) subject mainly to labeling and packaging requirements, and in some cases limitations upon amounts of the material to be carried." (App. D, at 2).

The Board noted that its own tariff regulations (Title 14, C.F.R. §221.38(a)(5)) required that carrier tariff rules on the carriage of such restricted articles be in conformity with Part 103 of the FAA regulations, in recognition of the primary responsibility of DOT/FAA for regulations on the subject. 9/ The Board found that the scope of the embargoes "is in complete divergence with the FAA regulations and any proposals or legislation to modify them." (id. at 3).

9/ Section 403(a) of the Act, 49 U.S.C. 1373(a), requires that the carriers file tariffs showing, among other things, "all * * * rules [and] regulations" they impose in connection with the provision of their authorized services. The Board's tariff regulations to which reference is made in the text require that:

> "(a) * * * [T]he rules and regulations of each tariff shall contain:
>
> * * *
>
> "(5) The rules and regulations relating to the transportation of explosives and other dangerous or restricted articles, showing the articles which are not acceptable for transportation as well as those articles which are acceptable for transportation

(Footnote continued)

The Board also found that the embargoes would preclude carriage of numerous articles needed for medical and other purposes and would be contrary to the carriers' common carrier obligations and their statutory duty to provide adequate service. Noting in this connection that the embargo regulations specifically state that they are not to be "construed as relieving any air carrier of any duty otherwise imposed upon it to furnish authorized transportation or to observe all requirements thereunder" (id. at 3), the Board concluded that the regulation does not apply to these embargoes. It therefore "rejected" the embargo notices.

ALPA filed a petition for reconsideration and for a stay of the Board's order of rejection, contending that the order was both legally and factually in error. However, before the Board could respond to these arguments, ALPA filed its petition for review and a motion for a stay with this Court. Subsequently, on March 19, 1975, the Board issued

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Footnote continued--

> only when specified packing, marking, and labeling requirements have been met. Such rules and regulations shall further provide the specified packing, marking and labeling requirements. All such provisions shall be in conformity with Part 103 of the Federal Aviation Regulations (14 C.F.R. Part 103) (as amended or revised from time to time), including those portions of the Interstate Commerce Commission Regulations for Transportation of Explosives and Other Dangerous Articles which are referred to in Part 103 of the Federal Aviation Regulations (14 C.F.R. Part 103). The rules and regulations required by this subparagraph are required to be set forth only in those tariffs which contain rates or charges for the transportation of explosives and other dangerous or restricted articles or in a tariff issued in accordance with §221.104."

Order 75-3-61 (Supplemental Documents) which denied ALPA's request for a stay but deferred action on the request for reconsideration in order to allow all parties and interested persons an opportunity to respond to the petition.

In determining to deny ALPA's request for a stay the Board considered ALPA's allegations to the effect that carriers have a right under Sections 404 and 1111 of the Federal Aviation Act of 1958 (49 U.S.C. §§1374, 1511) to impose stricter standards upon the transportation of hazardous cargoes than the DOT/FAA minimum safety standards; that carriers have a right to reject cargoes deemed by them to be inimical to safety of flight; and that the DOT/FAA and Board regulations do not require carriers to accept any cargo, but simply to establish labelling and packaging standards to which shipments of hazardous materials must conform before a carrier can transport them if willing to do so. In reply to these assertions, the Board pointed out that:

> "Contrary to the implication in ALPA's petition, the Board has not purported to determine whether the DOT/FAA regulations are minimum, or minimum and maximum standards, nor was the order premised on any theory that the airlines' obligation to carry traffic stems from those regulations. Rather, the Board considers that a carrier's refusal to carry traffic tendered in accordance with the safety regulations is inconsistent with its statutory obligation to provide adequate service, and with its duties assumed in the acceptance of a certificate of public convenience and necessity." Order 75-3-61, at 2.

The Board noted that ALPA's argument regarding a carrier's right to refuse transportation pursuant to Section 1111(a) of the Act (49 U.S.C. 1511(a)) disregarded the provision of the statute which subjects such right of a carrier "to reasonable rules and regulations prescribed by [the FAA Administrator]."[10/] The Board concluded:

> "It is clear from reading the entire section that Congress intended any carrier refusal to transport property for safety reasons to be subject to reasonable rules and regulations prescribed by the FAA Administrator. By answer in opposition to the ALPA petition, DOT similarly asserts that Section 1111 does not confer a warrant for carriers to refuse transportation of hazardous materials which conform with applicable DOT/FAA regulations. Such regulations have been prescribed at length on what materials may be carried in passenger carrying aircraft as well as on all-cargo aircraft, the permissible amounts and packaging requirements therefor, what materials may not be carried, etc. The FAA Administrator having thus preempted this area of regulation, no basis remains to conclude that carriers are free to pick and choose their traffic." (Footnote omitted; Order 75-3-61, at 3).

The Board acknowledged that the agency responsible for safety under the Act had urged this position on the Board in complaining against the embargoes, and cited that agency's statement of its authority:

10/ The provision of Section 1111(a) at issue reads:

> "Subject to reasonable rules and regulations prescribed by the Administrator, any such carrier may also refuse transportation of a passenger or property when, in the opinion of the carrier, such transportation would or might be inimical to safety of flight." (Emphasis supplied)

> "Because the FAA exercises exclusive jurisdiction to regulate safety in air commerce and because the FAA has, by regulation, provided for the safe carriage of radioactive and other hazardous materials, individual carriers are legally precluded from engaging in ad hoc regulation of the transportation of those materials in derogation of the statutory authority and responsibility of the DOT/FAA." Order 75-3-61, at 3, n. 3.

The Board accordingly denied ALPA's request for a stay, stating its belief that to do otherwise would "abrogate [its] statutory responsibilities to the shipping and consuming public by sanctioning pervasive refusals to carry shipments required by the public" (footnote omitted, id. at 3-4). Notwithstanding the statement and position of DOT/FAA, however, the Board expressly stated:

> "We need not and do not here reach the question of the extent of the authority of an air carrier to refuse to carry a particular shipment of hazardous goods based upon circumstances relating specifically to that shipment." Id. at n. 4.

By Order 75-4-75, dated April 15, 1975, (reproduced as App. B to this brief) the Board, among other things, denied ALPA's petition for reconsideration of Order 75-2-127 and the carriers' applicationsto extend the embargoes that order rejected.[11/] By way of further reply to ALPA's allegations concerning Section 1111(a) and its view as to the applicability

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11/ In accordance with this Court's stay of Order 75-2-127, the Board has deferred effectiveness of Order 75-4-75.

of its regulation in [illegible]onte[illegible] blanket refusals to carry the Board stated (id. at 6):

> "The Embargo Regulations are not available to carriers for their declarations to the shipping and consuming public as to what freight they will thereafter refuse to carry. Its application is limited to a carrier's temporary inability to accommodate traffic it acknowledges it would be obligated, but for the inability, to carry. The Board thus has no present occasion to determine the extent or nature of a carrier's right under Section 1111 to refuse, on safety-related grounds, to carry particular freight. That determination can only be made in an enforcement proceeding on consideration of the specific facts of a specific refusal to carry wherein Section 1111 was advanced in defense of the refusal (see footnote 4, supra)."

ARGUMENT

Introduction

It is clear from even the most cursory reading of ALPA's brief that its real complaint is against DOT/FAA. The brief consists almost exclusively of a litany of alleged deficiencies in DOT/FAA safety regulation in the area of air transportation of hazardous materials. The Board is not, however, answerable for any of ALPA's complaints in this area for, as the Board said, and ALPA does not contend otherwise, safety regulation is the exclusive responsibility of DOT/FAA.[12/]

Furthermore, the Board's holding in this case was simply that its

12/ Cf. ALPA v. C.A.B., 215 F.2d 122 (1954), in which this Court declined to interfere with a safety determination made by the Board when it had safety rulemaking jurisdiction; i.e. prior to the enactment of the Federal Aviation Act of 1958. The 1958 statute transferred safety rulemaking functions to DOT/FAA. See also, ALPA v. C.A.B., 494 F.2d 1118 (C.A.D.C. 1974).

embargo regulation was inapplicable to the blanket refusals to carry embraced by the rejected embargo notices, and ALPA does not challenge that determination. Nevertheless, it contends that this determination somehow unlawfully interferes with the carriers' rights under Section 1111(a) to reject shipments which they deem "inimical to safety of flight."

We are at a loss as to how an unchallenged legal determination that the embargo regulation is inapplicable can be said to result in an unlawful interference with the carriers' rights, and cannot help but note in this connection the conspicuous absence of any complaint on this score by the carriers themselves. Since, however, the contention that the Board has unlawfully interfered with the carriers' rights may inferentially suggest a claim that the Board's interpretation of its regulation was erroneous, we will show first that there was no error in this respect. We will then show that the Board has not "unlawfully interfered" with the carriers' rights under Section 1111(a) of the Act.

1. The Board properly determined that its embargo regulation is inapplicable to the carriers' blanket refusals to carry.

The embargo regulation on its face applies to situations in which a carrier is "temporarily unable" to transport shipments tendered to it for "compelling reasons not within the control of the carrier * * *" (14 C.F.R. 228.1).[13/] The Board stressed this as recently as 1973 when,

13/ Furthermore, its basic purpose was for the benefit of shippers, specifically, "to provide the shipping public with as much advance notice of an embargo as circumstances will permit" (ER-239, November 7, 1958, 23 F.R. 8787).

in reissuing Part 228, it stated its intent that "embargo" means "in substance, a temporary disability of an extraordinary nature which prevents the carriage of all freight, or particular classes of freight, between specified points." ER-789, adopted February 6, 1973 (38 Fed. Reg. 4241).

Thus, as the Board said in its order on reconsideration (App. B, infra, p. 6), the embargo regulation is "not available to carriers for their declarations * * * as to what freight they will thereafter refuse to carry" (emphasis in original). In other words, the embargo regulation contemplates disability, not disinclination, to carry.

So applied, the embargo regulation fits neatly into the over-all regulatory scheme. As previously indicated, the tariff provisions of the Act and the implementing regulations provide a means by which carriers may specify those articles which they will not accept for shipment for whatever reason.[14/] In recognition of this, the Board stated at the time it reissued Part 228 in 1973 that "a prolonged

14/ Such tariffs are, of course, subject to Board scrutiny on its own initiative or in response to complaints by third parties, and such scrutiny may lead the Board to a determination that the tariffs should be rejected or otherwise disapproved. Any such Board determination would, of course, be subject to judicial review. Indeed, consolidated judicial review is currently being sought with respect to several Board orders insofar as such orders either: (a) reject, (b) purport to reserve a right to reject after effectiveness, or (c) direct carriers to conform tariffs to a pending rule-making proceeding, when such hazardous articles tariffs are not identical with Federal Aviation Administration rules. Delta Air Lines v. C.A.B., C.A.D.C. No. 74-1984, et al.

refusal to carry property, or particular types of property, is a matter necessitating a tariff filing rather than an embargo" (38 F.R. 4241). Moreover, the embargo regulation itself provides that it "shall not be construed as precluding any carrier from filing an appropriate tariff where the carrier finds it necessary, on a long-term or permanent basis, to limit the scope of its holding out of authorized freight services" (Section 228.7), and that a "[r]efusal to accept property for transportation in accordance with restrictions and limitationsin the tariff * * * of an air carrier shall not be deemed an embargo" (Section 228.1).

In light of all this, there is obviously no infirmity in the Board's unchallenged determination that the embargo regulation does not apply to the "embargoes" covered by the rejected notices. They did not involve temporary inability based on considerations beyond the carriers' control. Rather, they involved a blanket refusal to carry, regardless of whether a given shipment can safely be carried, based upon the carriers' professed dissatisfaction with the DOT/FAA safety regulations and their enforcement.[15/] In short, the "embargoes" reflected disinclination, not disability, and were thus properly held to be beyond the scope of the embargo regulation.[16/]

15/ We again note the conspicuous absence of the carriers from this litigation. It is, after all, their notices that were rejected.

16/ Even if the matter were not as clear as it is, the rule of judicial deference to administrative interpretation of a statute "is even more clearly in order" where the agency is interpreting its own regulation. Udall v. Tallman, 380 U.S. 1, 16 (1965). In such cases, the agency interpretation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." Bowles v. Seminole Rock Co., 325 U.S. 410, 414 (1945).

2. The Board's determination that the embargo regulation is inapplicable in no way interferes with any rights of the carriers under Section 1111(a) of the Act.

Under the embargo regulation (Section 228.2), an embargo notice is not to be "construed as relieving any air carrier * * * of any duty otherwise imposed upon it to furnish authorized transportation service" until such time as the Board might enter an order approving an application for extension of the original notice. If the Board should approve an application for extension, the approval would constitute its acknowledgement that the circumstances are such that a carrier's refusal to carry would not be inconsistent with its service obligation. Conversely, if the Board does not approve the application for extension, its disapproval represents a determination that the circumstances upon which the refusal is based will not justify a finding that the refusal is not inconsistent with the carrier's service obligation. With these propositions in mind, we turn to the consequences of the Board's unchallenged determination that the embargo regulation was inapplicable and to ALPA's contention that that determination resulted in "unlawful interference" with the carriers' Section 1111(a) rights.

We note first that ALPA appears to suggest that the carriers have no service obligation with respect to hazardous materials. Apart from the fact that this flies in the face of the carriers' tariffs, the very action of the carriers which has resulted in this controversy conclusively answers ALPA's novel assertion. If the carriers had no service obligation to transport hazardous materials, there would have been no point in invoking the embargo regulations.

In any event, the "embargoes" here at issue constituted blanket refusals to carry virtually all shipments of all articles listed as hazardous materials by DOT/FAA regulations. The "embargoes" thus admittedly contemplated wholesale refusals to transport on safety grounds without any determination that the carriage of a particular shipment would in fact be unsafe. Thus, all that the Board did by rejecting the notices (and by later refusing the applications for extensions) was to state its inability to conclude that such wholesale refusals to carry would not be inconsistent with the carriers' service obligations. Contrary to ALPA's contention, this does not in any way interfere with the carriers' rights under Section 1111(a). As the Board said (App. B, infra, p. 4, fn. 4), it "has not ruled upon the question of the extent of the authority of an air carrier under Section 1111 to refuse to carry a particular shipment of hazardous goods based upon the circumstances relating specifically to that shipment." It has held only that Section 1111(a) does not contemplate wholesale refusals to carry regardless of whether carriage of a given shipment

17/ See also Order 75-3-61 (Supplement Documents), p. 4, fn. 4.

would be "inimical to safety of flight", and nothing in ALPA's brief supports a contrary view.[18/]

As the foregoing demonstrates, the rejection order imposed no new duty on the carriers.[19/] Moreover, contrary to ALPA's contention, that order does not direct any carrier to transport anything. Such a direction would be tantamount to an enforcement order under Section 1002(c), 49 U.S.C. 1482(c), which can only be issued on the basis of an evidentiary record after notice and hearing, and the Board specifically pointed out that any enforcement action must await a specific case.[20/] All that the Board has done by its rejection order is to refuse to bless the wholesale refusal to carry. The carriers thus remain free to refuse to transport, though on notice that they do so at their own risk. In other words, the carriers are in the same position as they were before issuance of the rejection order. Now, however, they have notice that the Board does not view their wholesale refusals as bona fide embargoes.

18/ Williams v. Trans World Airlines, 509 F.2d 942 (C.A. 2, 1975) tends to support the Board's view, not ALPA's. It involved a single ad hoc refusal to carry based on special circumstances, and the Court was very careful to satisfy itself that the carrier had made an individualized determination that a specific individual could not be carried safely.

19/ "Its [the embargo regulation's] application is limited to a carriers' temporary inability to accommodate traffic it acknowledges it would be obligated, but for the inability, to carry" (App. B., infra, at 6).

20/ Compare Adler v. Chicago & Southern Airlines, Inc., 4 C.A.B. 113 (1943).

CONCLUSION

The Board's order should be affirmed.

Respectfully submitted,

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Dated: April 15, 1975

APPENDIX A

Relevant provisions of the Federal Aviation Act of 1958, 72 Stat. 737, as amended, 49 U.S.C. 1301, et seq.:

TITLE II--CIVIL AERONAUTICS BOARD: GENERAL POWERS OF BOARD

* * * * *

GENERAL POWERS AND DUTIES OF THE BOARD

General Powers

Sec. 204 [72 Stat. 743, 49 U.S.C. 1324] (a) The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out the provisions of, and to exercise and perform its powers and duties under this Act.

* * * * *

TITLE IV -- AIR CARRIER ECONOMIC REGULATION

* * * * *

TARIFFS OF AIR CARRIERS

Filing of Tariffs Required

Sec. 403. [72 Stat. 758, as amended by 74 Stat. 445, 49 U.S.C. 1373] (a) Every air carrier and every foreign air carrier shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for air transportation between points served by it, and between points served by it and points served by any other air carrier or foreign air carrier when through service and through rates shall have been established, and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation. Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information, as the Board shall by regulation prescribe; and the Board is empowered to reject any tariff so filed which is not consistent with this section and such regulations. Any tariff so rejected shall be void. The rates, fares, and charges shown in any

tariff shall be stated in terms of lawful money of the United States, but such tariffs may also state rates, fares, and charges in terms of currencies other than lawful money of the United States, and may, in the case of foreign air transportation, contain such information as may be required under the laws of any country in or to which an air carrier or foreign air carrier is authorized to operate.

Observance of Tariffs; Rebating Prohibited

(b) No air carrier or foreign air carrier shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in its currently effective tariffs; and no air carrier or foreign air carrier shall, in any manner or by any device, directly or indirectly, or through any agent or broker, or otherwise, refund or remit any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities, with respect to matters required by the Board to be specified in such tariffs, except those specified therein. * * * * *

* * * * *

RATES FOR CARRIAGE OF PERSONS AND PROPERTY

Carrier's Duty to Provide Service, Rates, and Divisions

Sec. 404. [72 Stat. 760, 49 U.S.C. 1374] (a) it shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers; to provide safe and adequate service, equipment, and facilities in connection with such transportation, to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportation; and, in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers.

Discrimination

(b) No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular

person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

* * * * *

TITLE X -- PROCEDURE

* * * * *

COMPLAINTS TO AND INVESTIGATIONS BY THE SECRETARY OF TRANSPORTATION AND THE BOARD

* * * * *

Sec. 1002. [72 Stat. 788, 49 U.S.C. §1482] * * * * *

* * * * *

Entry of Orders for Compliance With Act

(c) If the Secretary of Transportation or the Board finds, after notice and hearing, in any investigation instituted upon complaint or upon their own initiative, with respect to matters within their jurisdiction, that any person has failed to comply with any provision of this Act or any requirement established pursuant thereto, the Secretary of Transportation or the Board shall issue an appropriate order to compel such person to comply therewith.

* * * * *

TITLE X - PROCEDURE

* * * * *

JUDICIAL REVIEW OF ORDERS

Orders of Board and Administrator subject to Review

* * * * *

Findings of Fact Conclusive

(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or if it was not urged, unless there were reasonable grounds for failure to do so.

Sec. 1511. [As amended Pub.L. 93-366, Title II, §204, Aug. 5, 1974, 88 Stat. 418] Authority to refuse transportation; grounds; agreements for carriage of persons or property deemed to include agreements to refuse carriage upon refusal of consent to search

(a) The Administrator shall, by regulation, require any air carrier, intrastate air carrier, or foreign air carrier to refuse to transport--

(1) any person who does not consent to a search of his person, as prescribed in section 1356(a) of this title, to determine whether he is unlawfully carrying a dangerous weapon, explosive, or other destructive substance, or

(2) any property of any person who does not consent to a search or inspection of such property to determine whether it unlawfully contains a dangerous weapon, explosive, or other destructive substance.

Subject to reasonable rules and regulations prescribed by the Administrator, any such carrier may also refuse transportation of a passenger or property when, in the opinion of the carrier, such transportation would or might be inimical to safety of flight.

(b) Any agreement for the carriage of persons or property in air transportation or intrastate air transportation by an air carrier, intrastate air carrier, or foreign air carrier for compensation or hire shall be deemed to include an agreement that such carriage shall be refused when consent to search such persons or inspect such property for the purposes enumerated in subsection (a) of this section is not given.

ECONOMIC REGULATIONS

PART 228—EMBARGOES ON PROPERTY

(Issued as ER-789 effective Mar. 12, 1973.)

Subpart A—General Provisions

Subpart B—Application To Extend Embargoes

Subpart A—General Provisions

§ 228.1 Definitions.

"Embargo" means the temporary refusal by an air carrier to accept for transportation over any route or segment thereof, or to or from any area or point of a connecting carrier, any commodity, type or class of property (other than passenger baggage) duly tendered, where, because of lack of facilities or personnel, or because it is required to give preference or precedence to other traffic entitled to priority, or because of other compelling reasons not within the control of the carrier, it is temporarily unable to perform all of the authorized transportation service requested of it. Refusal to accept property for transportation in accordance with restrictions and limitations in the tariff or the certificate of an air carrier shall not be deemed an embargo.

§ 228.2 Duration of embargo.

(a) Except as provided herein no embargo imposed under the provisions of this part shall extend beyond 30 days from the initial effective date of such embargo.

(b) Any air carrier who finds it necessary to continue in effect any embargo imposed under the provisions of this part for more than 30 days from the initial effective date of such embargo may file an application under Subpart B of this part for authority to extend such embargo for more than 30 days. Pending the disposition by the Board of such application, the 30-day limitation prescribed in paragraph (a) of this section shall not apply.

(c) This part shall not be construed as relieving any air carrier, during the initial 30-day embargo period prescribed herein and for any period that such embargo is automatically extended, of any duty otherwise imposed upon it to furnish authorized transportation service or to observe all requirements of the Federal Aviation Act, and the rules and regulations thereunder.

§ 228.3 Notice of embargo.

Whenever any certificated air carrier finds that it will be necessary for it to impose an embargo on the acceptance of any shipment, said air carrier shall give public notice thereof immediately, except when such embargo is authorized by order of the Board. When an embargo has been extended beyond the period specified in the notice, or beyond the initial 30-day period pending the disposition of an application for extension pursuant to § 228.2, a supplemental notice to that effect shall be given.

§ 228.4 Contents of embargo notice.

The contents of the notice of embargo required by § 228.3 shall be in the form prescribed in the appendix attached to this Part 228, shall be executed by the Embargo Officer of the air carrier, and shall contain the following information:

(a) The serial number of the embargo notice. Each embargo notice shall be numbered in ascending sequential order.

(b) The name of the carrier declaring the embargo and its principal place of business.

(c) The issue, effective, and expiration dates of the embargo.

(d) Whether the embargo is applicable to all commodities, and if not, a description of the particular commodity, commodities, items or classes of commodities to be embargoed.

(e) Whether all points on the carrier's routes are embargoed, and if not, a designation of the origination and destination point, geographic area, and routes affected by the embargo.

(f) If the embargo is applicable only to property transported on certain types

of equipment, the equipment types and flights subject to such embargo shall also be specified.

(g) An explicit statement of the grounds which the carrier claims to justify the imposition of the embargo.

(h) A note which reads as follows:

If the embargoing carrier shall find it necessary to continue in effect the embargo described in this notice beyond the date of expiration specified herein, it shall file an application with the Civil Aeronautics Board for authority to extend such embargo. Should such application be filed, any interested person may, within 7 days after the filing, file with the CAB and serve upon the carrier a written answer in opposition to or in support of such application, together with the reasons why the application should be denied or granted. Any person interested in receiving a copy of any such application for extension as may be filed by the carrier, or in receiving notification of any modification of the embargo, or of termination thereof before, or of extension thereof beyond, the date of expiration specified herein, should so advise the undersigned Embargo Officer promptly.

Any interested person may make an informal complaint concerning the embargo described in this notice by addressing such complaint to the Director, Office of Consumer Affairs, Civil Aeronautics Board, Washington, DC 20428. In addition, any interested person may make a formal complaint against such embargo (see 14 CFR 302.201).

§ 228.5 Nature of public notice.

The embargo notice required by this part shall be posted in a conspicuous and public place at each of the carrier's offices where property of the kind affected by the embargo can reasonably be expected to be received. Such notice shall be posted immediately and, unless circumstances beyond the control of the air carrier necessitate a later posting thereof, in no event less than 24 hours before the embargo becomes effective. Upon posting of said notice, one copy thereof shall be sent to each connecting carrier which may be affected by the embargo and two copies shall be mailed to the Tariffs Section of the Civil Aeronautics Board at Washington, D.C. 20428. When a notice is not posted 24 hours or more before an embargo takes effect, the air carrier shall attach to the copies mailed to the Board a brief explanation of the circumstances which necessitated the late posting of the notice.

§ 228.6 Notice of modification, termination, or extension of embargo.

In any case where the embargo is modified, terminated earlier than, or extended beyond, the expiration date set forth in the embargo notice, a notice of the modification, termination, or extension of the embargo shall be posted, and copies thereof shall be sent to each connecting carrier, local official, and other person, upon whom an application for extension is required to be served by § 228.22, and shall be filed with the Board in the same manner and to the same extent as the original notice of embargo.

§ 228.7 Tariff limitations.

This part shall not be construed as precluding any carrier from filing an appropriate tariff where the carrier finds it necessary, on a long-term or permanent basis, to limit the scope of its holding out of authorized freight services.

Subpart B—Application To Extend Embargoes

§ 228.20 Contents of application.

An application to extend an embargo beyond 30 days after its effective date shall contain all of the information specified in § 228.4, and, in addition, the following:

(a) An explicit statement of the facts relied upon to establish that, for one or more of the reasons set forth in § 228.1, the applicant is unable to perform the specified transportation service for more than 30 days, and any other matter which the applicant desires the Board to officially notice; and, by affidavit, such other facts as are alleged in support of the application.

(b) A statement that any interested person may file an answer in opposition to or in support of the application within 7 days after the filing of the application.

(c) A list of the persons upon whom copies of such application were served in accordance with § 228.22.

§ 228.21 Filing of application.

An executed original and 19 copies of an application made pursuant to § 228.20 shall be filed with the Docket Section of the Civil Aeronautics Board, Washington, D.C. If such application is filed later than 10 days following the initial effective date of the embargo, it will be accepted only if it includes, or is accompanied by, a showing of good cause why such application could not have been filed earlier.

§ 228.22 Service.

(a) A copy of each application filed

and of each answer addressed thereto pursuant to the provisions of this subpart, shall be served personally, or by registered or certified mail, upon such persons as the Board may designate in a particular case. A copy of each application shall also be so served on the following persons in all cases:

(1) Each connecting carrier required to be served with an embargo notice pursuant to § 228.5.

(2) The chief executive of the city, town, or other unit of local government at any point located in the United States or any possession thereof where property of the kind affected by the embargo can reasonably be expected to be received.

(3) Any person who has made an appropriate request of the carrier's Embargo Officer.

(b) A copy of such application shall also be posted in a conspicuous place at each of the carrier's offices where property of the kind affected by the embargo can reasonably be expected to be received.

§ 228.23 Answers by interested persons and replies thereto.

(a) Any interested person may file with the Board, and serve upon the applicant, a written answer in opposition to or in support of an application filed pursuant to § 228.21, within 7 days after the filing thereof. Such answers shall set forth in detail the reasons why the application should be denied or granted, a statement of any other matters which it is desired that the Board shall officially notice, and, by affidavit, such other facts as are alleged in support of the answer. An executed original and 19 copies of such answer shall be filed with the Docket Section of the Board.

(b) Within 5 days from the date of service of an answer, the applicant may file a reply thereto and shall serve it upon any person who has filed an answer. An executed original and 19 copies of such reply shall be filed with the Docket Section.

§ 228.24 Disposition.

An order may be issued extending an embargo for a specified period, upon a finding by the Board that for one or more of the reasons set forth in § 228.1 the carrier is unable to perform the specified transportation service. Where the public interest so requires, the Board may act upon an application without waiting for answers thereto.

APPENDIX

EMBARGO NOTICE

Issue date _____
Effective date _____ Embargo Notice No. _____
Expiration date _____

1. Name and address of carrier. _____

2. Description of embargoed commodities. _____

3. Points affected by embargo. _____

4. Equipment type(s) and flight(s) subject to embargo. _____

5. Reasons for embargo: _____

Embargo Officer:

Name

Title

Address

NOTE: If the embargoing carrier shall find it necessary to continue in effect the embargo described in this notice beyond the date of expiration specified herein, it shall file an application with the Civil Aeronautics Board for authority to extend such embargo. Should such application be filed, any interested person may, within 7 days after the filing, file with the CAB and serve upon the carrier a written answer in opposition to or in support of such application, together with the reasons why the application should be denied or granted. Any person interested in receiving a copy of any such application for extension as may be filed by the carrier, or in receiving notification of any modification of the embargo, or of termination thereof before, or of extension thereof beyond, the date of expiration specified herein, should so advise the undersigned Embargo Officer promptly.

Any interested person may make an informal complaint concerning the embargo described in this notice by addressing such complaint to the Director, Office of Consumer Affairs, Civil Aeronautics Board, Washington, DC 20428. In addition, any interested person may make a formal complaint against such embargo (see 14 CFR 302.201).

APPENDIX B

Order 75-4-75

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 15th day of April, 1975

Embargoes and tariff provisions refusing certain hazardous materials proposed or in effect for ALASKA AIRLINES, INC. ALLEGHENY AIRLINES, INC. AMERICAN AIRLINES, INC. CONTINENTAL AIR LINES, INC. DELTA AIR LINES, INC. EASTERN AIR LINES, INC. FRONTIER AIRLINES, INC. HAWAIIAN AIRLINES, INC. HUGHES AIR CORP., d/b/a HUGHES AIRWEST NATIONAL AIRLINES, INC. OZARK AIR LINES, INC. PIEDMONT AVIATION, INC. TRANS WORLD AIRLINES, INC. UNITED AIR LINES, INC. WESTERN AIR LINES, INC.	Dockets 27090, 27380, 27382, 27428, 27488, 27494, 27495, 27509, 27518, 27519, 27520, 27521, 27537, 27545, 27546, 27549, 27554, 27560, 27588, 27655

ORDER

By Order 75-2-127, dated February 28, 1975, the Board, sua sponte, rejected the various embargoes filed by a number of carriers[1/] which gave notice that the carriers were refusing or substantially limiting carriage of all shipments of hazardous materials. The grounds for such rejection were essentially that the embargoes were in divergence from the regulations of the Federal Aviation Administration (FAA) and from proposals or legislation to modify them; that the embargoes would prohibit the carriage of many items necessary for medical purposes; that the embargoes were in derogation of the carriers' obligation to provide adequate service; and that, under these circumstances, it is clear that the Board's Embargo Regulations would not apply.

1/ Alaska Airlines, Inc. (Alaska), Allegheny Airlines, Inc. (Allegheny), Eastern Air Lines, Inc. (Eastern), Frontier Airlines, Inc. (Frontier), Hawaiian Airlines, Inc. (Hawaiian), Ozark Air Lines, Inc. (Ozark), Piedmont Aviation, Inc. (Piedmont), Trans World Airlines, Inc. (TWA), and Western Air Lines, Inc. (Western).

In addition, embargoes have been filed by American Airlines, Inc. (American), Delta Air Lines, Inc. (Delta), Continental Air Lines, Inc. (Continental), Hughes Air Corp., d/b/a Hughes Airwest (Airwest), United Air Lines, Inc. (United), and Western Air Lines, Inc. (Western) prohibiting radioactive materials aboard passenger-carrying aircraft, subject to exceptions principally for human medical purposes. Tariff provisions are in effect or proposed for American, Continental, Delta, Eastern, Frontier, National, and United containing similar restrictions. Pursuant to Part 228 of the Board's Economic Regulations (14 CFR 228.2(b)), most of the aforementioned carriers have filed applications to extend their embargoes, and, in most cases, the initial 30-day embargo period has elapsed.

Complaints have been filed by the Department of Transportation (DOT) requesting rejection of the embargoes (both those already rejected by Order 75-2-127, supra, as well as others filed) and proposed extensions of embargoes, and rejection or, in the alternative, suspension and investigation of the various tariff restrictions directed to radioactive materials. The complaints allege, inter alia, that FAA, acting under delegated authority from the Secretary of Transportation, has promulgated regulations prescribing uniform regulation in the classification, packaging, marking, and labeling of all hazardous materials for transportation by air, including regulations for radioactive materials transported by air; that because FAA exercises exclusive jurisdiction to regulate safety in air commerce and has, by regulation, provided for the safe carriage of radioactive and other hazardous materials, individual carriers are legally precluded from engaging in ad hoc regulation of the transportation of these materials in derogation of the statutory authority and responsibility of DOT; and that the carriers are required by the Federal Aviation Act to provide for the common carriage of property, and, in particular, to accept shipments of properly packaged and labeled hazardous materials, including radioactive materials, under their existing tariff rules and in general conformity with the regulations of FAA. Further, the complainant asserts that the radioactive materials proposed to be excluded, when properly packaged and labeled in accordance with FAA Regulations, can be transported by air without materially jeopardizing health or safety; that radioactive materials having identical properties and tendered in identical quantities but intended for uses other than those referenced in these tariffs or embargoes and which would therefore be rejected by the carriers, pose no greater threat to health or safety than those materials allowed under the restrictions; and that these restrictions are at variance with Section 108(a) of the Transportation Safety Act of 1974 and with FAA's proposed implementing regulations pending in Docket 14249 (Notice 75-2).

Various carriers and the Air Line Pilots Association, International (ALPA) have filed answers in support of these embargoes or tariff provisions.[2] ALPA, in addition, has filed a petition in Docket 27588 for reconsideration and for stay of Order 75-2-127.[3] The filings variously assert, inter alia, that the restrictions embodied in the embargoes or tariffs are in response to a decision by ALPA calling upon its members to refuse to carry shipments of certain hazardous materials on passenger aircraft. Operation S.T.O.P. is a program adopted by ALPA for effectiveness February 1, 1975, under which the Association bans the carriage on passenger aircraft of all items defined as hazardous materials in FAA Regulations, the carriers' restricted articles tariff, or the IATA Restricted Articles Regulations, with certain exceptions primarily for medical purposes. ALPA's pleadings essentially allege lack of enforcement and compliance with existing regulations, and are accompanied by a number of exhibits including, among other things, copies of accident reports, a report by the General Accounting Office evaluating FAA's procedures regarding inspection and enforcement in regulation of transportation of hazardous materials, testimony before Congressional committees on this subject, a report by the Atomic Energy Commission, and a number of letters between ALPA and DOT concerning allegations of lack of enforcement and compliance with existing regulations. ALPA contends, further, that the carriers have a right under Sections 404 and 1111 of the Federal Aviation Act of 1958 (the Act) to surpass the government's minimum safety standards and reject cargo which they deem inimical to safety of flight. In support of this contention, ALPA alleges that DOT/FAA Regulations do not require anyone to accept any cargo. They only allow the acceptance of properly labeled, packaged, etc., hazardous materials, and ALPA asserts that the Board's own regulations are to the same effect citing 14 CFR 221.104, 221.38(a)(5), and 228.1. In addition, the carriers assert that they are temporarily unable to perform normal transportation services for such articles because of delays in gaining agreement among the industry, ALPA, FAA, and DOT regarding the carriage of materials classified as hazardous and considered to be a potential safety hazard for airline passengers and crew members, and that substantial confusion and conflict exist among interested parties in the industry concerning the adequacy and enforcement of safety regulations governing the transportation of hazardous materials.

2/ The carriers filing answers to DOT's complaints are Alaska, Allegheny, Delta, Eastern, Frontier, Airwest, Ozark, TWA, United, Hawaiian, Piedmont, and Western.

3/ By Order 75-3-61, dated March 19, 1975, the Board denied the request for stay and deferred action on the petition for reconsideration. In addition, ALPA petitioned the United States Court of Appeals for the Second Circuit for a review of Order 75-2-127, and for a stay of such order pending review. The Court has granted ALPA's request for a stay.

Upon consideration of the complaints filed by DOT, the answers thereto, the various embargoes filed with the Board and the applications for extensions thereof, the ALPA petition for reconsideration of Order 75-2-127, and all relevant matters, the Board has concluded (1) to grant DOT's requests relating to restricted materials to the extent of rejecting carriers' embargoes not previously rejected by Order 75-2-127; (2) to deny the various carriers' applications for authority to extend embargoes and to reject tariff filings which would similarly restrict the carriage of hazardous materials;4/ and (3) to deny the ALPA petition for reconsideration in Docket 27588.

Section 404(a) of the Act places upon every air carrier holding a certificate of public convenience and necessity an affirmative duty to provide and furnish adequate air transportation as authorized by its certificate. The Congress has subjected the prerogative of the carriers to refuse to transport hazardous materials to reasonable rules and regulations prescribed by the Administrator of FAA (Section 1111 of the Act). Title VI of the Act places the duty upon the Administrator to prescribe reasonable rules and regulations governing such practices as the Administrator may find necessary to provide for safety in air commerce. And the Administrator has prescribed at length what material may be carried in passenger-carrying aircraft as well as on all-cargo aircraft, the permissible amounts and packaging requirements therefor, what materials may not be carried, etc. (14 CFR Part 103).

4/ The complaint of DOT in Docket 27521 against various tariffs was drafted as a tariff complaint under subpart E of the Board's Rules of Practice (Section 302.500 et. seq.), its complaint in Docket 27520 against embargoes was drafted as an enforcement complaint under subpart B (Section 302.200 et. seq.), and its first complaint, Docket 27488, involved both tariffs and embargoes and included the affidavit prescribed in enforcement proceedings under subpart B. This order, as did Order 75-2-127, considers the question of rejection as essentially a prospective matter. We note, however, that all parties have had the opportunity to file pleadings directed to the issues herein under either subpart B or E of the Board's Rules of Practice. Our action herein is without prejudice as to such procedures that may be initiated by the Board's Bureau of Enforcement with respect to allegations that the carriers have failed to provide adequate service. As the Board noted in Order 75-3-61 denying ALPA's request for a stay of Order 75-2-127, the Board has not purported to determine whether DOT/FAA Regulations are minimum or minimum and maximum standards, nor was the order premised upon any theory that the airlines' obligations to carry traffic stems from those regulations. Moreover, the Board has not ruled upon the question of the extent of the authority of an air carrier under Section 1111 to refuse to carry a particular shipment of hazardous goods based upon the circumstances relating specifically to that shipment.

Moreover, pursuant to the Transportation Safety Act of 1974, enacted January 3, 1975, the Secretary of Transportation is required to issue within 120 days of the passage of the law, regulations prohibiting any transportation of radioactive materials on any passenger-carrying aircraft "unless the radioactive materials involved are intended for use in, or incident to, research, medical diagnosis, or treatment, so long as such materials as prepared for and during transportation do not pose an unreasonable hazard to health and safety." To implement the Transportation Safety Act, FAA is currently considering a rulemaking proposing amendments to its regulations (Docket 14249, Notice 75-2) that would permit the shipment of safe radioactive materials "intended for use in, or incident to" research of any kind, and for nonhuman as well as human medical diagnosis or treatment.

The Board has previously accepted in principle the primary responsibility of DOT for regulations on the transportation of hazardous materials, including radioactive materials, by air. Further, the Board's Regulations (Section 221.38(a)(5)) provide that tariff rules relating to the transportation of restricted articles shall be in conformity with Part 103 of the Federal Aviation Regulations.5/ The FAA Administrator having thus preempted this area of regulation, no basis remains to conclude that carriers are free to pick and choose their traffic. It is clear that Congress intended any carrier's refusal to transport property for safety reasons to be subject to reasonable rules and regulations prescribed by the FAA Administrator. By answer in opposition to the ALPA petition, DOT similarly asserts that Section 1111 does not confer a warrant for carriers to refuse transportation of hazardous materials which conform with applicable DOT/FAA Regulations.

5/ The Board notes DOT's statement that the carriers have failed to request modification of existing rules governing the carriage of hazardous materials instead of proceeding with tariff restrictions in violation of existing regulations.

The Board does not condone the carriers' filing of restrictions without obtaining the necessary modification of FAA Regulations. We believe it most important, however, that expedited procedures be available to enable a carrier to obtain an FAA decision on its proposals in a relatively short period of time (e.g., 30 days), even if the proposal is to be approved only for an interim period. Once the carrier has received such approval, it could then file the appropriate tariffs for either interim or indefinite duration. We have previously ruled that in the absence of such a procedure, the Board has "no choice but to reject the tariff for nonconformance with Part 103" (Order 74-11-1, dated November 1, 1974, at page 3).

The Embargo Regulations are not available to carriers for their declarations to the shipping and consuming public as to what freight they will thereafter refuse to carry. Its application is limited to a carrier's temporary inability to accommodate traffic it acknowledges it would be obligated, but for the inability, to carry. The Board thus has no present occasion to determine the extent or nature of a carrier's right under Section 1111 to refuse, on safety-related grounds, to carry particular freight. That determination can only be made in an enforcement proceeding on consideration of the specific facts of a specific refusal to carry wherein Section 1111 was advanced in defense of the refusal (see footnote 4, supra).

In denying ALPA's request for reconsideration, the Board has carefully considered the petitioner's contentions and its answers to the DOT complaints and other matters before it, and finds no basis to depart from its conclusions set forth in acting upon the ALPA motion for a stay in Order 75-3-61. In sum, Section 404(a) of the Act imposes an obligation to carry upon the airlines holding certificates of public convenience and necessity, the public interest requires movement of the traffic which is prohibited by the embargoes and tariffs, and the right of the carriers to refuse to transport under Section 1111 of the Act is subject to reasonable rules and regulations prescribed by the Administrator. Moreover, ALPA's allegation that the Board errs in concluding that items necessary for medical purposes are embargoed is inappropriate, in that ALPA's contention that its S.T.O.P. program exempts a variety of medical materials is an allegation directed to its program, and not to the embargoes filed by the carriers with the Board.6/

6/ The Board has noted ALPA's reference to an aircraft accident report of the National Transportation Safety Board (NTSB) with particular reference to the conclusion therein that a contributing factor was the general lack of compliance with existing regulations governing the transportation of hazardous materials which resulted from the complexity of the regulations, the industrywide lack of familiarity with the regulations at the working level, the overlapping jurisdictions, and the inadequacy of government surveillance. ALPA, however, fails to note that, in a letter referred to therein and made a part thereof, the NTSB report had considered the ALPA contention made in that proceeding that all restricted materials should be banned from interstate air transportation. The NTSB rejected this contention, stating "The Safety Board shares the Association's concern, but believes that conscientious compliance with current regulations and procedures would obviate such a drastic step." In summary, NTSB has considered and rejected prior proposals of ALPA which would have effected a complete embargo upon all restricted materials.

The scope of the embargoes, even if it could be determined that the Embargo Regulations applied to this situation, and of tariff provisions effective or proposed to become effective is in divergence from FAA Regulations and any proposals or legislation to modify them. These embargoes and tariff provisions would prohibit the carriage of many items necessary for nonhuman medical and various research purposes, and are in derogation of the carriers' common-carrier obligation to carry and their statutory obligation to provide adequate service. Even in situations where applicable, the Board's Embargo Regulations specifically provide that they shall not be construed as relieving any air carrier of any duty otherwise imposed upon it to furnish authorized transportation service or to observe all requirements of the Federal Aviation Act and the rules and regulations thereunder. The Board does not consider that its Embargo Regulations embrace the matters set forth in the carriers' embargo notices considered herein. The Board will, as indicated, deny the petition for reconsideration of Order 75-2-127, rejecting embargo notices filed by nine carriers, and further reject the embargo notices filed by other carriers relating to radioactive materials which are more restrictive than present or proposed regulations of DOT/FAA. The Board will deny all applications to extend the embargoes rejected by this order or by Order 75-2-127.

The tariff provisions proposed or in effect for American, Continental, Delta, Eastern, Frontier, National, TWA, and United that restrict the carriage of hazardous materials permitted by present or proposed DOT/FAA Regulations present essentially the same problems as discussed above for embargoes. However, as to refusals to carry hazardous articles pursuant to tariffs, the Board must defer to the position of DOT/FAA to the effect that freight which complies with FAA Regulations must be accepted for carriage by the carriers, and that Section 1111 does not permit their refusal. These tariffs are not consistent with Section 221.38(a)(5) of the Board's Economic Regulations and will be rejected pursuant to the provisions of Section 403 of the Act and subpart 0 of Part 221 of the Board's Regulations.

The United States Court of Appeals for the Second Circuit, by an order dated March 25, 1975, in Air Line Pilots Association Int'l v. Civil Aeronautics Board, No. 75-4049, granted a motion filed by ALPA for a stay of Board Order 75-2-127 to preserve the status quo, pending its appeal. In these circumstances and consistent with the Court's action, the Board will stay the effectiveness of its order, pending determination by the Court of the issues before it in Case No. 75-4049.7/

7/ The Board recognizes that this order considers not only the embargoes involved in Order 75-2-127, but also additional embargoes (with some differences in scope), as well as tariffs relating to restricted materials. We believe, however, that the issues herein and those before the Court in Case No. 75-4049 (consolidated with Case No. 75-4055) are sufficiently similar to warrant a stay of the effectiveness of the Board's order.

This order will nevertheless be issued, served upon all parties, and published in the Federal Register to apprise all interested persons of the Board's opinions and decisions upon the issues now before it, subject, however, to the aforesaid provisions for a stay.

Accordingly, pursuant to the provisions of the Federal Aviation Act of 1958, and particularly Sections 204(a), 401, 403, 404, 1002, 1006, and the provisions of Parts 221 and 228 of the Board's Economic Regulations (14 CFR Parts 221 and 228),

IT IS ORDERED THAT:

1. Subject to the conditions and provisions set forth in ordering paragraph 2 herein:

A. Embargo Notice No. AA 1-75 filed by American Airlines, Inc., Embargo Notice No. 4 filed by Continental Air Lines, Inc., Embargo Notice No. 4-74 filed by Delta Air Lines, Inc., Embargo Notice No. 5 filed by Hughes Air Corp. d/b/a Hughes Airwest, Embargo Notice No. 1-75 filed by United Air Lines, Inc., and Embargo Notice No. WA-C CE02 filed by Western Air Lines, Inc. are rejected;

B. The applications for authority to extend embargoes filed by American Airlines, Inc. in Docket 27537, Delta Air Lines, Inc. in Docket 27428, Hughes Air Corp. d/b/a Hughes Airwest in Docket 27546, and United Air Lines, Inc. in Docket 27545 are denied;

C. The application for authority to extend embargoes filed by Alaska Airlines, Inc. in Docket 27554, Allegheny Airlines, Inc. in Docket 27494, Eastern Air Lines, Inc. in Docket 27495, Frontier Airlines, Inc. in Docket 27519, Hawaiian Airlines, Inc. in Docket 27549, Ozark Air Lines, Inc. in Docket 27560, Piedmont Aviation, Inc. in Docket 27509, and Western Air Lines, Inc. in Docket 27518 are denied;

D. 28th Revised Page 70, 15th, Revised Page 128, 9th Revised Page 148, 36th Revised Page 160, 14th Revised Page 160-A, 14th Revised Page 160-B, and 15th Revised Page 160-D of C.A.B. No. 82, issued by Airline Tariff Publishing Company, Agent, are rejected, effective 14 days after the effective date of this order;

E. The petition for reconsideration of Order 75-2-127 filed by the Air Line Pilots Association, International in Docket 27588 is denied;

F. Except to the extent granted herein, the complaints of the Department of Transportation in Dockets 27521 and 27655, the American Medical Association in Docket 27380, the American College of Radiology in Docket 27382, and Mr. William A. Brobst, Chief, Transportation Branch, Division of Waste Management and Transportation, Atomic Energy Commission in Docket 27090 are dismissed;

G. Action upon the complaints of the Department of Transportation in Dockets 27488 and 27520 is deferred with respect to the request for enforcement action, and, except to the extent granted herein, the requests for prospective rejection of both tariffs and embargoes are dismissed;

2. The effective date of the Board's order as set forth in subparagraphs A through G herein of ordering paragraph 1 is hereby stayed, pending determination by the United States Court of Appeals for the Second Circuit of the issues now before the Court in Air Line Pilots Association, Int'l. v. Civil Aeronautics Board, No. 75-4049, and further orders of the Board consistent therewith; and

3. Copies of this order shall be served upon the Department of Transportation, the American Medical Association, the American College of Radiology, Mr. William A. Brobst, Chief, Transportation Branch, Division of Waste Management and Transportation, Atomic Energy Commission, the Air Line Pilots Association, International, and upon all the carriers party hereto.

This order will be published in the Federal Register.

By the Civil Aeronautics Board:

EDWIN Z. HOLLAND

Secretary

(SEAL)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AIR LINE PILOTS ASSOCIATION, INT'L, CAPTAIN EUGENE L. COCHRAN, Petitioners,	:	
v.	:	Nos. 75-4049 75-4055
CIVIL AERONAUTICS BOARD, Respondent.	:	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served Respondent's typewritten brief, personally upon Daniel M. Katz, Air Line Pilots Assn', Int'l, and by causing copies thereof to be mailed to the following persons:

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April 15, 1975